COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Agawam Public Schools **BSEA # 1403554**

RULING ON PARENTS' MOTION FOR EMERGENCY PLACEMENT

On November 27, 2013, Parents filed a *Motion for Emergency Placement*, which is the subject of the instant ruling. Agawam filed an opposition on December 3, 2013, and a telephonic motion hearing was held on December 4, 2013.[1]

Through their *Motion for Emergency Placement*, Parents seek an order from the BSEA requiring Agawam to immediately make a referral to a Melmark residential program in Pennsylvania and to pay the full cost of this program "once [Student's] application has been accepted."

I briefly recount the procedural background of this case before turning to a discussion of the Motion itself.

On November 12, 2013, Parents filed their hearing request against Agawam Public Schools (Agawam) and the Massachusetts Department of Children and Families (DCF) in the above referenced matter. By ruling of December 3, 2013, I allowed DCF's motion to dismiss it as a party.

On December 2, 2013, Agawam filed a motion to join the Massachusetts Department of Developmental Services (DDS). A motion hearing is scheduled for December 17, 2013 at 3:30 PM.

Student, an eleven-year-old boy, is diagnosed with autism and is non-verbal. He has been placed by Agawam at an out-of-district day placement at the May Center School for the past seven years pursuant to a mostly-accepted IEP. Student also receives services from DDS.

Currently, Student has not been able to attend his May Center placement because he is an inpatient at the Hampstead Hospital in New Hampshire, where he has been since October 28, 2013. Parents take the position that immediately prior to the hospitalization, Student had been demonstrating continuing and unabated self-injurious behaviors, including scratching himself, and slapping and punching his head. Parents also take the position that Student had learned how to unlock and open all doors in the family home and run across a busy street, putting himself at risk of severe injury or death. Student had been hospitalized previously at Hampstead Hospital from September 5 to 18, 2013 as a result of what Parents have characterized as unsafe, self-injurious and aggressive behaviors. Parents support these assertions through affidavits from Father and their expert (Frank Robbins, PhD).

[1] Parents are represented by attorney Matthew Engel. Agawam is represented by attorney Peter Smith.

Parents contend that Student requires a residential educational placement and is not safe to leave Hampstead Hospital until such a placement is obtained. They are concerned that insurance coverage for the hospital costs may end, putting the current hospital placement at risk. Parents, with the assistance of Dr. Robbins, have considered possible residential placements that might be appropriate for Student and that have an immediate opening, and they have concluded that only a Melmark program in Pennsylvania is both appropriate and available. Parents assert that the openings in this program may be soon filled, thereby justifying the need to order Agawam to make an immediate referral to secure an opening. Parents support these assertions through affidavits from Father and Dr. Robbins.

Agawam takes the position that Student does not require residential services to meet his educational needs and that DDS may be the appropriate agency to provide any needed residential services to address Student's non-educational needs.

Agawam asserts that there is no indication that Student's current placement at the May Center is unable to meet Student's educational needs. Agawam questions whether, even if Student requires residential services, these services must be provided in an out-of-state placement which neither Parents nor their expert have visited. Agawam has contacted staff at the Melmark, Pennsylvania, program and on the basis of information from that program, takes the position that no students will be accepted into that program prior to March 2014.

Agawam points out that it has not yet had an opportunity to formally review Dr. Robbins' recent evaluation, and is prepared to do so by scheduling an IEP Team meeting on an expedited basis. This would allow the Team to consider Student's current needs and how they should be met. Agawam asserts that Parents' Motion, if allowed, would improperly circumvent the IEP Team process.

The Individuals with Disabilities Education Act (IDEA) was enacted "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE]."[2] "The primary vehicle for delivery of a FAPE is an IEP [individualized education program]."[3]

Special education and related services need not address "problems truly 'distinct' from learning problems."[4] Thus, the need to address a student's behavior deficits depends on whether these deficits can appropriately be considered separable from the learning process.[5]

---

[2] 20 U.S.C. § 1400 (d)(1)(A).

[3] *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) (internal quotations omitted).

[4] *Gonzalez* , 254 F.3d at 352.

[5] See 20 U.S.C. 1414(d)(3)(B)(i) ("The IEP Team shall . . . in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior"); *Indep. Sch. Dist. No. 284, Wayzata Area School v. AC*, 258 F.3d 769 (8th Cir. 2001) (student's behavior problems are not separable from the student's learning process, and behavioral and emotional problems must be addressed through residential services if the student is to succeed academically); *Rome Sch. Comm. v. Mrs. B.*, 247 F.3d 29, 33 n.3 (1st Cir.2001) (noting that, in determining adequacy of IEP for emotionally disturbed boy, "[t]he question is whether [his] behavioral disturbances interfered with the child's ability to learn"); *Board of Education of Montgomery County v. Brett Y*, 155 F.3d 557 (4th Cir. 1998) ("residential placement that is necessary for 'medical, social, or emotional problems that are segregable from the learning process' need not be funded by the local education agency."); *Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1122 (2nd Cir. 1997) ("fact that a residential placement may be required to alter a child's regressive behavior at home as well as within the classroom, or is required due primarily to emotional problems, does not relieve the

The IDEA reflects a preference for mainstreaming disabled students.[6] This entails ensuring, "[t]o the maximum extent appropriate," that disabled children are taught with nondisabled children.[7] "The goal, then, is to find the least restrictive educational environment that will accommodate the child's legitimate needs."[8] Similarly under Massachusetts law, FAPE must be provided in the least restrictive environment.[9]

When considering whether a student is entitled to a residential educational placement, the appropriate standard, as reflected within several First Circuit decisions, is whether the educational benefits to which a student is entitled can only be provided through around-the-clock special education and related services, thus necessitating placement in an educational residential facility.[10] The Second Circuit Court of Appeals has admonished decision-makers to "proceed cautiously" before ordering a residential educational placement, and I take seriously this admonition.[11]

In support of its position that an emergency, residential placement order should be issued by the BSEA, Parents rely on Father's affidavit and Dr. Robbins' affidavit. Presumably, it is only Dr. Robbins who is an expert. Dr. Robbins opines that residential services are needed and warranted for Student. However, there is nothing within his affidavit from which I may determine that he has considered all less restrictive solutions and if so why he believes that they are inappropriate to meet Student's needs. Thus, his affidavit, even if fully credited, is not sufficient to support an order requiring residential services.

If I were to conclude that residential services are warranted, Parents seek emergency placement at Melmark, Pennsylvania. To justify an order placing Student there, I would need to find that it is an appropriate program for Student, but Parents provide insufficient basis from which I may reach this conclusion. Dr. Robbins asserts that the program would be appropriate but it is unclear what this opinion is based upon other than his general statement that he is "fully confident in Melmark's programming." Father has a more detailed understanding of the program but has insufficient expertise to render a credible and persuasive opinion about its appropriateness. No one has visited Melmark, Pennsylvania, and this program has not reviewed Student for appropriateness.

Agawam notes correctly that its responsibility only extends to addressing Student's educational needs. If it can be shown that Student needs residential services but that this need is based only upon non-educational factors, then Agawam would have no responsibility to provide residential services. Father's and Dr. Robbins' affidavits, even if accepted as true, provide insufficient basis for me to conclude that Student's need for residential services, if found to exist, would be Agawam's responsibility.

---

state of its obligation to pay for the program under federal law so long as it is necessary to insure that the child can be properly educated").

[6] 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 20 USC § 1412(a)(5).

[7] 20 U.S.C. § 1412(a)(5)(A). See also 20 US § 1400(d)(1)(A); 20 USC § 1412(a)(1)(A); 34 CFR 300.114(a)(2(i).

[8] *C.G. ex rel. A.S. v. Five Town Community School Dist*., 513 F.3d 279, 285 (1st Cir. 2008). See also *Rafferty v. Cranston Public School Committee*, 315 F.3d 21, 26 (1st Cir. 2002) ("Mainstreaming may not be ignored, even to fulfill substantive educational criteria."), quoting *Roland v. Concord School Committee*, 910 F.2d 983, 992-993 (1st Cir. 1990).

[9] See MGL c. 71B, ss. 2, 3; 34 CFR 300.114(a)(2(i); 603 CMR 28.06(2)(c).

[10] See *Gonzalez v. Puerto Rico Department of Education*, 254 F.3d 350 (1st Cir. 2001); *Abrahamson v. Hershman*, 701 F.2d 223, 228 (1st Cir. 1983).

[11] *Walczak v. Florida Union Free School Dist*., 142 F.3d 119 (2nd Cir. 1998).

Significant parts of Parents' position, as supported by their affidavits, are contested by Agawam. For example, Agawam takes the position that Student's current placement at the May Center can appropriately meet Student's educational needs. Further, Agawam asserts that there may be appropriate residential programs, if one is needed, within Massachusetts, thereby making it both unnecessary and inappropriate for placement in Pennsylvania. Agawam has also questions Parents' assertion that openings are currently available at Melmark, Pennsylvania. Nothing short of an evidentiary hearing will allow me to resolve these and other material factual disputes in this case.

Parents take the position that I have the authority to order an emergency placement on the basis of affidavits and argument, without the need for an evidentiary hearing, and that the appropriate standard is that used by courts for purposes of granting a preliminary junction. Under this standard, Parents ask that I consider their likelihood of success and the harm that may occur if an order is not issued. Considering this standard solely for the purpose of discussion and for the reasons explained above, I find that on the basis of the affidavits and arguments presented to me, I cannot determine Parents' likelihood of success on the question of whether Student is entitled to a residential placement. I further find that any harm to Student can be minimized by having a prompt evidentiary hearing, followed soon thereafter by a summary decision that determines whether Student is entitled to a residential placement and, if so, whether a particular placement should be ordered.

For these reasons, Parents' *Motion for Emergency Placement* will be denied.

Nevertheless, Parents have persuaded me of the importance of quickly resolving this dispute on the merits. Student continues to be at Hampstead Hospital, with the possibility of being discharged before a resolution of the instant dispute. Parents have made credible allegations regarding the severity and dangerousness of Student's behavior if he were to return to live at home and attend his May Center day placement. I find that there is an urgent need to determine Agawam's responsibilities to Student under state and federal special education laws. Therefore, as is reflected in greater detail in a separate scheduling order and as discussed with the parties, an evidentiary hearing has been scheduled for December 19 and 23, 2013, with oral closing arguments on December 24, 2013. I expect to issue a summary decision on or before December 31, 2013 for the purpose of determining Agawam's responsibilities to Student, to be followed by a full decision (no later than 25 days after the close of the record) for the purpose of explaining more fully the reasons for the determinations made in the summary decision.

ORDER

Parents' *Motion for Emergency Placement* is DENIED.

By the Hearing Officer,

_____
William Crane
Dated: December 5, 2013